To Save the Rule of Law you Must Apparently Break It

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During its summit, the European Council broke the deadlock regarding the Multiannual Financial Framework (MFF), Next Generation EU and the Rule of Law (RoL) Regulation. In this analysis, we focus on the EUCO Conclusions, notably on the 'interpretative declaration on the new rule of law mechanism' (section 1). Originally crafted by the German Presidency in close contact with Budapest and Warsaw, this text has enabled the EU25 to overcome the veto posed by Hungary and Poland on the adoption of the entire package, thus reaching a 'mutually satisfactory solution'. In its unusual declaration, the European Council agreed that "the Commission intends to develop and adopt guidelines on the way it will apply the Regulation" and that "[u]ntil such guidelines are finalised, the Commission will not propose measures under the Regulation." As to when these guidelines may be deemed to be finalized, the European Council agreed that "[s]hould an action for annulment be introduced with regard to the Regulation, the guidelines will be finalised after the judgment of the Court of Justice."

We argue that despite its political nature, this interpretative declaration entails major legal consequences. At a deeper level, it also shows an unprecedented disregard for the rule of law, and its principles and corollaries, governing the Union. Let's translate these into more intelligible terms offered by a national legal order. When looking at it through the prism of the nation state, this declaration amounts to a scenario in which the head of state agrees with the executive to suspend the application of a legislative act until the Constitutional Court has greenlighted it. This in a context in which this judicial review has no automatic suspensory effect (Art. 278 TFEU). Everyone sees how this would be legally questionable and the situation is no different when this scenario plays out in the EU, rather than a national, legal order. Here's why:

As we will show first, in adopting these Conclusions, the European Council acted *ultra vires*. Second, it infringed on the principle of institutional balance by undermining the prerogatives of the Parliament, Council, Commission and Court of Justice. We identify the Parliament as the most obvious candidate to row back against this illegitimate executive competence creep. To this end, it has some options at its disposal. One of these options is to challenge the EUCO's interpretative declaration before the Court of Justice. While some commentators have complacently dismissed the recent EUCO's interpretative declaration as a mere political, non-binding statement, we will argue in a last section how the declaration is a challengeable act under Article 263 TFEU given that it does produce very legal effects.

Ultra vires

Under Article 15(1) TEU, the EUCO shall not exercise legislative functions. Moreover, like any other EU institutions, it must "act within the limits of the powers conferred on it in the Treaties […] and practice mutual sincere cooperation" (Article 13(2) TEU). Under Articles 14(1) and 16(1) TEU, legislative functions are instead to be exercised by the Parliament and Council, depending on the legal basis. The draft RoL Regulation has Article 322(1)(a) TFEU as a legal basis, which prescribes the ordinary legislative procedure. By requiring the Commission to adopt guidelines (not per se foreseen in Article 5 of the RoL Regulation) and conditioning the application of the mechanism to the finalisation of such guidelines, the EUCO has *de facto* amended a (draft) legislative act (by analogy, see *Ville de Paris v. EU Commission*, para. 128). Yet the EUCO has no such power (Article 15(1) TEU), and has therefore no role under the ordinary legislative procedure.

Moreover, the EUCO amendment does not only concern the procedure through which measures may be imposed on Member States, but also the effective date from which the mechanism can be applied. However, the latter, temporal, element is an essential element of legislation (according to the Council Legal Service, see para. 7) on which the EU legislature must take an explicit decision itself (paras 46-47). As the *dies a quo* for the mechanism to be applied entails a political choice to be made, neither the Commission alone (Article 290 TFEU), nor *a fortiori* the EUCO (Article 15(1) TEU) could arrogate this power. But there is more. As this power belongs to the Parliament and Council, the European Council did not only act *ultra vires*, but also infringed those institutions' prerogatives and, as a result, the principle of institutional balance under Article 13(2) TEU.

The principle of institutional balance

A further, even more insidious, violation of the principle of institutional balance relates to the powers of the Court of Justice. Here it may be recalled that the European Council did not directly decide on the suspension of the application of the rule of law mechanism. The suspension will result from the action for annulment that Poland and Hungary have announced they will bring. Even if the President of the Court can of his own motion, or at the request of the Parliament and Council, decide that the case will go through the expedited procedure (Art. 133(3) of the Court's Rules of Procedure), the application will be delayed for several months. The EUCO conclusions containing the interpretative declaration thus effectively give suspensive effect to an action for annulment. Yet, under Article 278 TFEU, "actions brought before the Court of Justice of the European Union shall not have suspensory effect", and proceedings under Article 263 TFEU are no exception. This is a decision that only the Court of Justice can take.

Last but not least, the interpretative declaration also encroaches upon the Commission's prerogatives. While the European Council can give the EU the necessary impetus, and thus for instance *invite* the European Commission to table proposals or take initiatives (as it often does), it cannot give any instructions. This is explicitly reflected in Article 17(3)

TEU, which states that “in carrying out its responsibilities, the Commission shall be completely independent” and its members “shall neither seek nor take instructions from any Government or other institution, body, office or entity”. Yet that’s exactly what the EUCO attempted to do, thereby infringing the principle of institutional balance. Even if the EUCO would invoke an established practice to ‘task’ the Commission, it is established jurisprudence of the Court that practice cannot override the Treaty provisions (*Commission v Council*, para. 42). Further on this point, it is worth noting that, perniciously enough, the interpretative declaration in paragraph 3 (“The Council welcomes the Commission’s intention to adopt a Declaration”) makes the Commission bind itself to the very same content of the declaration. This is where the political declaration acquires a legally relevant nature. Under the principle of *patere legem quam ipse fecisti*, the Commission finds itself closely intertwined with the very same interpretative declaration impinging upon its own prerogatives. In other words, it commits itself to formalise in the very same underlying Rule of Law Regulation – through a Declaration – the de facto amendments (paragraph 2 from let. a) to k)) contained in the EUCO interpretative declarations. The EU Commission Declaration is the equivalent of a legal hara-kiri committed by the Commission’s own jurists. This Declaration is also set to emerge as the most tangible manifestation of the violation of the principle of institutional balance.

What’s next

The rather cynical conclusion is that the EUCO’s brinkmanship in ‘saving’ the rule of law mechanism results in a violation of the checks and balances of the EU legal order and hence of the rule of law.

Which scenarios can then be envisaged to ensure the full application of the Rule of Law Regulation and remedy the breaches of the EU’s system of checks and balances?

A first approach, which is dominating the public discourse, is for the European Parliament to simply ignore the EUCO Conclusions and to take the principled position that only the actual text of the Regulation matters. It could – similarly to the Commission, but this time *sua sponte* – adopt a Declaration to be annexed to the Regulation stating the obvious:

1.
    - the Regulation, like all EU legislation, should be implemented timely (as of its entry into force) and in good faith by all relevant actors (European Commission and Member States included), as per Articles 4(3), 13(2) and 17(1) TEU;
    - it is the Commission's duty, as guardian of the Treaty, to implement the mechanism in compliance with the terms of the Regulation and, in light of its independence under Article 17(3) TEU, without succumbing to political pressure from the European Council, other institutions or Member States;
    - it reserves the right to itself to institute an action for failure to act, under Article 265 TFEU, if the Commission does not take the measures required under the Regulation. This might enable the Parliament to denounce the 'chill' effect the EUCO interpretative statement is set to produce on the Commission insofar as such a statement has significantly reframed the RoL Regulation as originally drafted and negotiated. Think of let. c) that makes triggering of the mechanism conditional upon the adoption of Commission's guidelines; let. d), presenting the new mechanism is presented as of last resort; let f), excluding generalized deficiencies, etc).

A second approach is more daring and would see the European Parliament file an action for annulment under Article 263 TFEU against the EUCO's interpretative declaration. This would be legally possible since the EUCO conclusions, notably the interpretative statement, constitute a reviewable legal act under Article 263 TFEU. Indeed, since ***AETR***, it is well established case law of the Court that what matters is whether the contested act is intended to have legal effects. As demonstrated above, the EUCO interpretative statement aim to change the way in which the Rule of Law Regulation will be applied and the timing, which qualifies as intending to have legal effects. A counterargument here could be that the EUCO conclusions being, by their nature, political statements without legal value and therefore without legal effects, would not be reviewable and any action against them would be rejected as inadmissible. This formalistic reading of the interpretative declaration underpins the approach currently undertaken by the EU Parliament, and most commentators. Yet, taking a more realistic approach would have us recognize that by becoming increasingly dominant in the EU's institutional setup the European Council no longer limits itself to merely giving political impetus to the integration project. And while the Court of Justice in *Slovakia & Hungary v. Council* rejected that secondary legislation establishing the mandatory relocation mechanism could be annulled for contravening EUCO Conclusions (para. 145), it acknowledged that these documents can produce some legal effects, and therefore are legally relevant. This since it held that those conclusions had been 'implemented' through the adoption of the voluntary relocation mechanism, thus suggesting that European Council's conclusions had thereby exhausted their legal force (para. 144).

Regardless, even if the EUCO were to insist that its Conclusions are non-binding and the Court would accept this, it would not necessarily result in the inadmissibility of the Parliament's action. The Court in *France v. Commission* (para. 40) rejected "the Commission's argument that the fact that a measure […] is not binding is sufficient to

confer on that institution the competence to adopt it. Determining the conditions under which such a measure may be adopted requires that the division of powers and the institutional balance established by the Treaty […] be duly taken into account." As noted by AG Sharpston in the *Swiss Memorandum* case (paras 57-62), the Court seems "prepared to be less rigorous on admissibility in interinstitutional disputes where an important issue of principle needs to be resolved."

A third, and ideal scenario, would try to reconcile – at the time of adoption of the new ruled of law mechanism – the EUCO interpretative declaration and the actual RoL Regulation. This is left to the loyal cooperation of the EU Commission while adopting the act.

Conclusions

The interpretative declaration of 10 December 2020 is set to go down in history as a dark page for the rule of law in the Union legal order. Regardless of whether this document will be challenged before Court in the coming sixty days, it represents an unprecedented attempt by the Member States – gathered within the European Council – to disregard the rule of law as their dominant organisation principle. The Union being a "Community based on the rule of law", its members paradoxically seem to have damaged the Union in their effort to save it. Not only the Rule of Law Regulation finds itself in an unprecedented legal limbo, but as a result of the European Council's interventions this mechanism has also been reframed, with the Commission's tacit assent, under new terms that might relegate it into yet another rule of law oversight ghost.

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